



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE  
United States Patent and Trademark Office  
Address: 400 MICHIGAN AVE., N.E. PATENT AND TRADEMARKS  
WASHINGTON, D.C. 20230  
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09 617,930	08 16 2000	Daniel Schmoutz	008265-0340-999	1428

28765 7590 03 26 2002

WINSTON & STRAWN  
200 PARK AVENUE  
NEW YORK, NY 10166-4193

EXAMINER

TRAN LIEN, THUY

ART UNIT	PAPER NUMBER
----------	--------------

1761

DATE MAILED: 03 26 2002

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

09/617,930

Applicant(s)

Schmoutz et al.

Examiner

Lien Tran

Art Unit

1761



-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136 (a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on Jan. 15, 2002
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-14 and 29-40 is/are pending in the application.
- 4a) Of the above, claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-14 and 29-40 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claims \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are objected to by the Examiner.
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved.
- 12) ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. § 119

- 13) ☐ Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d).
- a) ☐ All b) ☐ Some\* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \*See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).

## Attachment(s)

- |   |  |
|---|--|
| 15) <input type="checkbox"/> Notice of References Cited (PTO-892)                       | 18) <input type="checkbox"/> Interview Summary (PTO-413) Paper No(s)         |
| 16) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)   | 19) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 17) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449) Paper No(s) | 20) <input type="checkbox"/> Other   |

Art Unit: 1761

1. Claims 1,32,34 and 39 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

In claim 1, the term "confectionery texture" is indefinite; what would be considered as "confectionery texture"?

In claim 32, what does "the shaped mixture" refer to?; the claims have not set forth any shape mixture.

In claim 34: Lines 2-3, the reference to "the further shaped component" is unclear because it is not known if it is referring to the first further shaped component or the second further shaped component. Line 3, what does "the shaped mixture" refer to?

In claim 39, the term "confectionery texture" has the same problem as in claim 1.

2. The new 112 second paragraph rejection is necessitated by amendment.

3. Claims 1 and 4-6 are rejected under 35 U.S.C. 102(a) as being anticipated by DE 2746479.

DE 2746479 discloses a shaped confectionery containing 5-75% shredded beet, bran or vegetable fibres. The shredded and dried beets may be used in form of finely divided powder or a coarse granule.

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are

Art Unit: 1761

such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

5. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

6. Claims 2-3, 7-14 and 29-40 are rejected under 35 U.S.C. 103(a) as being unpatentable over DE 2746479.

DE 2746479 does not disclose the size of the vegetable as claimed, the amount of fat and the inclusion of a cereal-based component, the layering of the bars to form a multilayer confectionery product, coating of the product with chocolate and placing the product with a wafer or biscuit.

It would have been obvious to include a cereal-based component such as oat, wheat, rice ect... to obtain a different texture, taste and flavor and to obtain the nutritious benefits provided by the grains.. It is notoriously well known in the art to include such inclusion in food bars. For example, there are many foods bar having rice crispies or oat flakes mixed in. It would also have been obvious to grind the vegetable solid to any particle size depending on the taste perception desired. For example, if a noticeable taste of the vegetable solid is desired, it would have been

Art Unit: 1761

obvious to grind the solid to big particles or if a very little taste of the solid is desired, it would have been obvious to reduce the vegetable to very fine particles. It would also have been obvious to vary the amount of fat depending on the fat content and the taste desired. The fact that the product in the reference is a confectionery; it is obvious that it contains sugar. The amount and type of sugar used would have been an obvious variation depending on the degree of sweetness and taste desired. It would also have been obvious to layer the bar to obtain a multilayer confectionery product to provide different novelties. This is notoriously well known in the art. It would also have been obvious to coat the product with chocolate coating to obtain different taste and flavor. Food bars are commonly coated with chocolate coating. As to consuming the product with a wafer or a biscuit, this would have been an obvious many of choice. Wafer products are filled with different materials such as ice cream, mousse, cream filling etc...

7. Claims 1-14 are rejected under 35 U.S.C. 103(a) as being unpatentable over DE 4224356.

DE 4224356 discloses a food product in which hot or warm chocolate is used as binder and the food product contains vegetable, pulse, salad, etc.. The vegetable component can be pureed or powdered.

DE 4224356 does not disclose the size of the vegetable as claimed, the amount of fat, the amount of vegetable and the inclusion of a cereal-based component.

It would have been obvious to include a cereal-based component such as oat, wheat, rice ect... to obtain a different texture, taste and flavor and to obtain the nutritious benefits provided by the grains.. It is notoriously well known in the art to include such inclusion in food bars. For

Art Unit: 1761

example, there are many foods bar having rice crispies or oat flakes mixed in. It would also have been obvious to grind the vegetable solid to any particle size depending on the taste perception desired. For example, if a noticeable taste of the vegetable solid is desired, it would have been obvious to grind the solid to big particles or if a very little taste of the solid is desired, it would have been obvious to reduce the vegetable to very fine particles. It would also have been obvious to vary the amount of fat depending on the fat content and the taste desired. As to the amount of vegetable, it would have been obvious to include any amount of vegetable depending on the taste, flavor desired. The binder is chocolate or sweet; thus, it is obvious that it contains sugar. The amount and type of sugar used would have been an obvious variation depending on the degree of sweetness and taste desired.

8. In the response filed Jan. 15, 2002, applicant traverses the 102 rejection over the DE 2746479 reference. Applicant argues the reference does not anticipate the claims because the amount of vegetable solid is less than the claimed amount. This argument is not persuasive. It is not clear where applicant takes the examples cited in the response from. Applicant must have a translation of the reference. In any case, the abstract provided by the applicant discloses the amount of vegetable is 5-75% (preferably 15-39%); thus, the broad amount and the preferred amount meet the claimed limitation. The examples in a reference are not the only embodiment of the reference. Applicant further argues the reference does not disclose a fat component in the continuous phase. The prior art products are shaped confectionery such as bars of chocolate, assorted chocolate bonbon; thus, it is inherent the fat component is in the continuous phase. The

Art Unit: 1761

products have the same ingredients and in the form as the claimed product. With respect to the 103 rejection, applicant makes the same argument as above which is not found to be persuasive.

With respect to the 103 rejection over the DE 4224356 reference, applicant argues the prior art does not provide a confectionery product. Confection is defined by the Webster's II New Riverside University Dictionary as a "sweet preparation". The product in DE 4224356 is food based on chocolate or sweet comprising a mixture of hot or warm chocolate or sweet stuff. Thus, by definition, the product is a confectionery product. The reference also teaches adding vegetable to the product; this will give vegetable consumption when the product is consumed. The amount of vegetable added would have been an obvious matter of choice; if a large amount of vegetable is desired, it would have been obvious to add a lot of vegetable.

9. The changes in the 103 rejection over the DE 2746479 reference is necessitated by amendment.

10. Applicant's arguments filed Jan. 15, 2002 have been fully considered but they are not persuasive.

11. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period

Art Unit: 1761

will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Lien Tran whose telephone number is (703) 308-1868. The examiner can normally be reached on Wed-Fri. The fax phone number for the organization where this application or proceeding is assigned is (703) 872-9310.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0661.

March 22, 2002

*Lien Tran*  
LIEN TRAN  
PRIMARY EXAMINER  
*3/22/02*